

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

GAYLE A. HOFFHINES

Claimant

VS.

U.S.D. NO. 497

Respondent

Self-Insured

)
)
)
)
)
)
)

Docket No. 213,618

ORDER

Claimant seeks review of a preliminary hearing Order by Administrative Law Judge Floyd V. Palmer dated July 17, 1996.

ISSUES

The Administrative Law Judge denied claimant's request for temporary total disability compensation. In her Request for Review, claimant stated the issue as follows:

"Whether the Administrative Law Judge erred in his failure to order payment of temporary total disability benefits to the claimant."

In her Memorandum Brief in Support of Claimant the issue is stated as follows:

"When is the Claimant's right to temporary total disability benefits suspended?"

Respondent raises the issue of the Appeals Board's jurisdiction to hear this appeal from a preliminary hearing Order.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the briefs of the parties, the Appeals Board finds for preliminary hearing purposes, as follows:

The Appeals Board is without jurisdiction to decide the issue of claimant's entitlement to temporary total disability benefits at this stage of the proceedings. Accordingly, the claimant's appeal must be dismissed.

This case came before the Administrative Law Judge upon claimant's Application for Preliminary Hearing following respondent's cessation of temporary total disability compensation to claimant. For purposes of preliminary hearing, respondent stipulated to the compensability of the claim and, in addition, stipulated that claimant was temporarily totally disabled. In support of its action in terminating claimant's temporary total disability compensation, respondent argued that because claimant worked for the respondent school district only during the school year, she was not entitled to receive temporary total disability compensation during the summer when she would not be employed by the respondent.

This so-called "equitable argument" proved successful with the Administrative Law Judge who, in granting his Order Denying Temporary Total Disability Compensation, found:

"Claimant is not able to work at a second job due to her injury. However, respondent should not be responsible for temporary total disability benefits due to lost income from a second job, only from the job with respondent which ended on May 31, 1996 by expiration of the employment contract. Claimant will return to work for respondent September 1, 1996, if able. Claimant is employed by respondent only for the 9 month school year."

Claimant presents three arguments for Appeals Board jurisdiction to hear this preliminary hearing appeal: (1) the Administrative Law Judge exceeded his jurisdiction in denying the payment of temporary total disability benefits; (2) the refusal to order that temporary total disability benefits be reinstated was an abuse of discretion; and (3) the "equitable defense" asserted by respondent to justify its cessation of temporary total disability benefits constitutes a jurisdictional issue of "whether certain defenses apply" under K.S.A. 44-534a(a)(2).

K.S.A. 44-551(b)(2)(A), as amended, provides, in pertinent part, the following:

"If an Administrative Law Judge has entered a preliminary award under K.S.A. 44-534a and amendments thereto, a review by the board shall not be conducted under this section unless it is alleged that the administrative law judge exceeded the administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing."

The Administrative Law Judge is granted jurisdiction to decide issues concerning the furnishing of medical treatment and the payment of temporary total disability compensation by K.S.A. 44-534a(a)(1). Subsection (a)(2) of that statute provides:

“Upon a preliminary finding that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the administrative law judge **may** make a preliminary award of medical compensation and temporary total disability compensation to be in effect pending the conclusion of a full hearing on the claim” (Emphasis added)

The above statute by using “may” instead of “shall” does not require that the administrative law judge order respondent to pay temporary total disability compensation even where the injury is compensable and there is no dispute but that the claimant met the criteria for being temporarily and totally disabled as defined in K.S.A. 44-510c(b)(2).

The above language in K.S.A. 44-534a(a)(2) appears to conflict with the provisions of K.S.A. 44-510c(b)(1) where it provides:

“Where temporary total disability results from the injury . . . [t]he payment of compensation of temporary total disability shall continue for the duration of any such disability”

However, the statute goes on to provide that the payment of temporary total disability compensation is subject to review and modification. Accordingly, some element of discretion by the administrative law judge is contemplated. We cannot say that the Administrative Law Judge either exceeded his authority or abused his discretion in this case.

As for the question of whether the Appeals Board has jurisdiction to review the preliminary hearing Order as raising a defense under K.S.A. 44-534a(a)(2), it provides:

“A finding with regard to a disputed issue of whether the employee suffered an accidental injury, whether the injury arose out of and in the course of the employee’s employment, whether notice is given or claim is timely made, or **whether certain defenses apply**, shall be considered jurisdictional, and subject to review by the board.” (Emphasis added)

Claimant contends that the respondent’s argument would constitute the type of defense contemplated by the above statute. The Appeals Board has previously held that the type of defenses contemplated by K.S.A. 44-534a(a)(2) are defenses which go to the compensability of the claim. The defense raised by the respondent at the preliminary hearing resulted in the denial or termination of temporary total disability compensation. However, it did not go to the compensability of the claim which, in this case, was admitted. Furthermore, the finding by the Administrative Law Judge was an interlocutory order which can be altered or rescinded upon a subsequent hearing or at the time of the final award. As stated previously, the denial

of benefits was not a finding with regard to the compensability of the claim, but instead went to the issue of claimant's entitlement to ongoing benefits. Unlike the defenses alleging, for example, intoxication or a willful failure to use a guard, the defense herein as to the payment of temporary total disability compensation does not constitute a defense which should be considered jurisdictional and subject to review by the Appeals Board on an appeal from a preliminary order.

The Appeals Board concludes that the issue raised by claimant in this appeal does not, in its present procedural posture, raise an issue which is subject to review under the limited jurisdiction granted the Appeals Board on appeals from preliminary hearing orders. The Administrative Law Judge's Order of July 17, 1996 is not a final order. It does not constitute a final ruling on the issue of claimant's entitlement to ongoing temporary total disability benefits. Furthermore, it does not relate to one of the jurisdictional issues listed in K.S.A. 44-534a or otherwise constitute an order which is outside the administrative law judge's jurisdiction. Therefore, the Appeals Board does not have jurisdiction to review the preliminary hearing order at this juncture of the proceedings. The claimant's request for review should, therefore, be dismissed.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the claimant's request for review, should be, and is hereby, dismissed and the July 17, 1996 Order Denying Temporary Total Compensation of Administrative Law Judge Floyd V. Palmer remains in full force and effect.

IT IS SO ORDERED.

Dated this ____ day of September 1996.

BOARD MEMBER

c: Michael R. Wallace, Shawnee Mission, KS
Kip A. Kubin, Overland Park, KS
Floyd V. Palmer, Administrative Law Judge
Philip S. Harness, Director